87-1268

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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRED L. WORTH,
Petitioner

vs.

SELCHOW & RIGHTER COMPANY,
HORN ABBOT, LTD., et al.
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This action involves the copyrights in two nonfiction works authored by petitioner Fred L. Worth, *The Complete Unabridged Super Trivia Encyclopedia* and *The Complete Unabridged Super Trivia Encyclopedia, Volume II*. The United States Court of Appeals for the Ninth Circuit held that petitioner could not maintain an action under the Copyright Act for infringement of his works by the creators of the parlor game *Trivial Pursuit*.

The questions presented are:

1. Whether an author of a nonfiction compilation may obtain a copyright in the selection of material included in his or her work.

2. What is the scope of copyright protection available to nonfiction compilations, such as petitioner's?

3. Under what circumstances may a trial judge or a court of appeals determine as a matter of law on summary judgment the issue of whether substantial similarity exists between two works?

LIST OF PARTIES

The parties to the proceedings below were petitioner Fred L. Worth, respondents Selchow & Righter Company and Horn Abbot, Ltd., and John Haney, Chris Haney, Scott Abbot and Ed Werner, individual officers of respondent Horn Abbot, Ltd.

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No. _____

IN THE

Supreme Court of the United States

October Term, 1987

FRED L. WORTH,
Petitioner,
vs.

SELCHOW & RIGHTER COMPANY, HORN ABBOT, LTD., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Fred L. Worth, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on September 8, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (Appendix A, *infra*) is reported at 827 F.2d 569 (1987).

The order of the District Court for the Central District of California granting summary judgment (Appendix B, *infra*) is unreported.

The order of the Court of Appeals for the Ninth Circuit denying petitioner's petition for rehearing (Appendix C, *infra*) is unreported.

JURISDICTION

The decision of the court of appeals was entered on September 8, 1987. Petitioner sought a rehearing and a rehearing en banc, and the petition for rehearing was denied on October 30, 1987. The jurisdiction of this Court is invoked under 28 U.S. Code Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The United States Constitution, Art. I, Sec. 8, Cl. 8, which provides:

> The Congress shall have power . . . To promote ~~the~~ progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

2. The definitional section of the United States Copyright Act, 17 U.S. Code Sec. 101, which provides in pertinent part:

> A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.

3. 17 U.S. Code Sec. 106, sub.2 which provides:

> Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> . . .
>
> (2) to prepare derivative works based upon the copyrighted work. . . .

STATEMENT OF THE CASE

Petitioner Fred L. Worth is an author of numerous books on trivia, including the two books that are at issue in this action, "*The Complete Unabridged Super Trivia Encyclopedia*" and "*The Complete Unabridged Super Trivia Encyclopedia, Volume II*" (hereinafter "*Super Trivia I*" and "*Super Trivia II*"). Petitioner wrote *Super Trivia I* in the 1970's, and published and copyrighted it in 1977; he published and copyrighted *Super Trivia II* in 1981. He wrote his books over a long period of years, spending tens of thousands of hours of research in compiling the material used in the books.

Super Trivia I and *Super Trivia II* follow a similar format. Each book contains thousands of entries, arranged alphabetically; each entry contains factual information on a subject of general interest. The titles of petitioner's books are somewhat fanciful — obviously neither book is "complete" or "unabridged," inasmuch as petitioner has already had a third "Super Trivia" book published; and the value of either book as an encyclopedic reference work is debatable. Representative pages of *Super Trivia I* are included as Appendix D, *infra*.

Respondents Horn Abbot, Ltd. and Selchow & Righter Co. are distributors of the popular board game *Trivial Pursuit*. The game utilizes question and answer cards containing "trivia questions" in various categories. Players attempt to answer the trivia questions correctly in order to progress to victory. Each of the various editions of the game contains one thousand cards, with six questions and answers per card, one in each of six different categories, or a total of 6,000 questions and answers per edition. Typical question and answer cards from *Trivial Pursuit* are copied as Appendix E, *infra*.

Petitioner discovered in 1984 that his two books had been used as the single largest source for the respondents' *Trivial Pursuit* question and answer cards. Some 3,231 questions and answers from various editions of *Trivial Pursuit* were apparently taken from *Super Trivia I*, and 745 questions and answers were taken from *Super Trivia II*.

Petitioner's analysis shows that 1,675 questions and answers from the "Genus" edition of *Trivial Pursuit* (27.9% of the questions and answers) were taken from *Super Trivia I*, 1,293 questions and answers in the "Silver Screen" edition (21.6%) were taken from *Super Trivia I* or *II*, and 828 questions in the "Baby Boomer" edition (13.8%) were taken from *Super Trivia I* or *II*.

In addition to the quantitative use of factual entries, petitioner's exact language was copied by respondents in many instances. In an example given by the Ninth Circuit below, petitioner's entry "Abel, Colonel Rudolf: Russian spy exchanged February 10, 1962 for F. Gary Powers, U-2 pilot," was transformed by respondents in the game card question and answer "Q - What Russian spy was exchanged for U-2 pilot Gary Powers in 1962? A - Rudolf Abel." Other instances of duplication of petitioner's language are even more striking. For example, petitioner's entry "Picasso, Pablo: Only living artist to have his work displayed in the Grand Gallery of the Louvre," became (in *Trivial Pursuit's* Genus edition). "Q - Who was the only living artist to have his work displayed in the Grand Gallery of the Louvre? A - Pablo Picasso." Petitioner contends that *every* alleged infringing question and answer from *Trivial Pursuit* contains some identical language to the entries in his books. Respondents have contended that only language absolutely essential to the conveyance of the idea behind each particular fact was duplicated.

Respondents have admitted to using petitioner's books as reference sources in composing the questions and answers

for their game. *Trivial Pursuit* was "created" by Chris Haney and Scott Abbot in December 1979. Haney and Abbot began writing questions and answers for the Genus edition of the game in 1980, writing the bulk of the questions and answers during a three month period in early 1981. In April 1981, along with Ed Werner and John Haney, they formed a Canadian corporation, respondent Horn Abbot, Ltd., to handle the marketing of the game. Haney and Abbot assigned their copyrights in the game's question and answers to respondent Horn Abbot, Ltd. in November, 1981. In November, 1982, Horn Abbot, Ltd. signed an agreement with respondent Selchow & Righter Company to distribute *Trivial Pursuit* in the United States. Sales volume was exceptional; by the end of 1984, United States sales had exceeded $256 million.

Petitioner filed this suit in the United States District Court for the Central District of California against respondents and against the four individual principals of Horn Abbot, Ltd. in October 1984, alleging that *Trivial Pursuit's* question and answer cards infringed the copyrights in his books. The individual defendants, all residents of Canada, moved to dismiss the complaint for lack of personal jurisdiction; the district court granted their motion. The remaining parties thereafter filed cross-motions for summary judgment. The district court granted the respondents' motion and denied petitioner's.

Petitioner appealed to the Ninth Circuit Court of Appeals on the rulings on both the motion to dismiss and the cross-motions for summary judgment. The Ninth Circuit panel affirmed the district court's rulings on the cross-motions for summary judgment, holding that, as a matter of law, there was no "substantial similarity" between petitioner's books and respondents' game cards. The court did not reach a decision on the motion to dismiss the claims against the individual defendants because of its affirmance

of summary judgment in favor of the corporate defendants on the merits.

The circuit court held that the respondents' use of over 3,200 facts from *Super Trivia I* and over 740 facts from *Super Trivia II* was not a "bodily appropriation" of petitioner's selection of factual entries. It held, in essence, that as long as petitioner's entire selection of facts had not been appropriated, that his copyrights were not infringed.

EXISTENCE OF JURISDICTION BELOW

Petitioner's claims for copyright infringement were brought in the district court pursuant to the jurisdictional authority of 28 U.S. Code Secs. 1338(a) and 1332(a).

REASONS FOR GRANTING THE WRIT

The court should grant review by writ of certiorari in this case because the court below has decided an important question of federal law that this court has not decided, and has decided it in a manner inconsistent with the purposes of the Copyright Act. The circuit court's decision conflicts with the decisions of other circuit courts of appeal on the subject.

Specifically, the court below erroneously denied any real measure of copyright protection to nonfiction compilation works such as petitioners. In doing so, it usurped the function of the trier of fact to determine copyright infringement, when it held that substantial similarity under copyright law was an issue that could be decided on summary judgment in this case.

I

THE NINTH CIRCUIT'S OPINION IS AN ERRONEOUS INTERPRETATION OF FEDERAL COPYRIGHT LAW, IN THAT IT DOES NOT PROVIDE FOR ANY MEANINGFUL COPYRIGHT PROTECTION TO NONFICTION COMPILATIONS

The Ninth Circuit's decision in this case effectively strips all available copyright protection from nonfiction compilation works. As such, the decision represents a severe misapplication of copyright law that this Court should correct.

As the Court stated in *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 547, 105 S.Ct. 2218, 2224, 85 L.Ed.2d 588, 599 (1985), "Creation of a nonfiction work, even a compilation of pure fact, entails originality." The Ninth Circuit's opinion in this case fails to recognize that petitioner's compilations of trivia included his original selection of material, and that his selection of material for inclusion in his books constituted protectible expression under copyright law.

Petitioner does not claim to own a copyright in the individual "facts" contained in his encyclopedias. However, he does claim that his selection of facts in each of the book is unique and copyrightable: "The originality involved in the selection and/or arrangement of such facts is sufficient to constitute the resulting compilation of a protectible literary work." M. Nimmer, *Nimmer on Copyright*, para. 2.04[B] (1987). The definition of a compilation in the Copyright Act, 17 U.S. Code Sec. 101, "a work formed by the collection and assembling of materials or of data that are selected, coordinated *or* arranged . . ." (emphasis

added), indicates that protection exists for a particular selection of materials.

Thus, petitioner claims a copyright in his selection of the thousands of trivial facts contained in his books. In writing his books, petitioner gathered together a great deal of information that is not commonly available to produce a unique collection of entertaining trivia. This act of selecting entertaining bits of trivia from the countless facts available in the universe is an integral and important part of his authorship. His books derive their special character from the collection in one place of diverse factual material, each bit of which has no particular independent significance. Respondents' wholesale appropriation of petitioner's collection in their game cards infringes his copyright.

In addition, petitioner contends that his exact language was duplicated in many instances by respondents in their *Trivial Pursuit* game cards. The copying of verbatim language from a nonfiction work constitutes copyright infringement, unless excused as fair use. *Harper & Row Publishers, supra,* 471 U.S. at 548, 105 S.Ct. at 1224, 85 L.Ed.2d at 599.

The Ninth Circuit's opinion held that petitioner's selection of facts for inclusion in his books was not infringed by respondents' game cards, because respondents did not take his "entire" or "complete" selection. 827 F.2d at 573, n.6. The court cited no authority for the proposition that a complete or entire appropriation of the selection in a compilation was a necessary prerequisite to a finding of infringement. The court dismissed the large-scale copying of petitioner's books by remarking that only a "certain percentage of his factual entries were used as the basis for game card questions." *Id.* The court was holding, in essence, that respondents' taking of 3,231 facts from a 623 page compilation of approximately 6,000 entries (*Super Trivia I*) was fair use.

The court below essentially ignored the analysis in *Harper & Row Publishers v. Nation Enterprises, supra,* a case involving a nonfiction narrative work. There, the Court found copyright infringement by a defendant who had copied approximately 300 words from a book-length manuscript. The Court noted that the amount of factual material taken was "insubstantial" "in absolute terms." *Harper & Row, supra,* 471 U.S. at 564, 104 S.Ct. at 2233, 85 L.Ed.2d at 610. Nonetheless, the Court found that the portions taken had "qualitative importance" to plaintiff's "original expression," and held that plaintiff's work had been infringed. *Id.*, 471 U.S. at 569, 105 S.Ct. at 2235, 85 L.Ed.2d at 612.

Petitioner submits that the taking of 3,231 facts from *Super Trivia I* is an infringement of his protectible copyright expression. Of the 623 pages in *Super Trivia I*, respondents copied factual information from all but 28 pages. Such a large-scale appropriation is inarguably of qualitative as well as quantitative importance to petitioner's selection of facts, and constitutes an infringing use of his book. Similarly, although the respondents' copying from *Super Trivia II* was quantitatively smaller (745 facts having been taken, as opposed to 3,231 from *Super Trivia I*), petitioner submits that such a taking is also a substantial copying that infringes his copyright in that work. At the very least, the matter should have been resolved at trial and not on summary judgment (see Section III, *infra*).

The Ninth Circuit expressed concern in its Opinion that petitioner is attempting to obtain a copyright in the facts contained in his books, or in his labor as such. 827 F.2d at 573. However petitioner's copyrights do not restrict the respondents, or anyone else, from using the individual facts from his books, so long as they have not created a substantially similar work. Respondents were free to use petitioner's *idea of collecting* numerous trivial facts in a

compilation. However, when they duplicated a large portion of his *actual selection* of trivial facts, they appropriated his particular expression. They could have used any of the virtually unlimited trivial facts in the universe to create their game cards. They instead copied petitioner's particular expression by a substantial duplication of his selection of facts. In doing so, they violated petitioner's exclusive right to prepare derivative works based upon his compilations under the Copyright Act. 17 U.S. Code Sec. 106, sub.2.

As to petitioner's contention that respondents copied his exact language in many instances, the court below held that no protectible expression of petitioner's had been taken, that "the game cards' repetition of words used by Worth to describe places, persons, and events constitutes 'mere *indispensable* expression' of particular facts or ideas." 827 F.2d at 573. In doing so, the court was making a factual judgment that was seemingly within the province of the trier of fact. Moreover, the court of appeals ignored the language in the *Harper & Row Publishers* case, that "verbatim copying of excerpts of the manuscript's form of expression would constitute infringement unless excused as fair use." *Harper & Row Publishers, supra* 471 U.S. at 548, 105 S.Ct. at 2224, 85 L.Ed.2d at 599. The Ninth Circuit was perhaps engaging in a fair use analysis in reaching its conclusion that only "indispensable" copying had occurred. But in doing so, it failed to recognize that fair use was never pleaded as a defense by respondents below; moreover, as this Court has held, fair use is to be applied on a case-by-case basis, thus rendering it appropriate for decision by a trier of fact, rather than an appellate court. *Harper & Row Publishers, supra,* 471 U.S. at 549, 105 S.Ct. at 2225, 85 L.Ed.2d at 600; 17 U.S. Code Sec. 107.

The appellate court's opinion has severe negative implication for all authors of nonfiction compilations, who have long enjoyed the protection of the copyright laws.

M. Nimmer, *Nimmer on Copyright*, para. 2.04[B], n.16 (1987). Under the court's analysis the scope of protection for such works, including computer data bases, their modern technological counterpart, is almost non-existent. This result flies in the face of the legislative intent expressed by the authors of the Copyright Act, who stated that the definition of "literary works . . . includes computer data bases." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., p.54 (1976), and the Act itself, which allows protection for compilations. 17 U.S. Code Sec. 101.

Petitioner submits that the Court should grant this petition for certiorari, to delineate the proper scope of copyright protection available to compilation works.

II

THE NINTH CIRCUIT'S OPINION CONFLICTS WITH THE DECISIONS OF THE COURTS OF APPEAL FOR THE SECOND, THIRD, SEVENTH AND EIGHTH CIRCUITS

The lower court's holding that petitioner's copyrighted compilations do not merit copyright protection, absent "complete" or "entire" duplication of petitioner's selection of factual material, raises a conflict with decisions of the courts of appeal for the second, third, seventh, and eighth circuits.

The Second Circuit has held, *Eckes v. Card Prices Update*, 736 F.2d 859, 862-63 (2d Cir. 1984) that the exercise of selectivity, creativity and judgment in choosing 5,000 baseball cards to create a list of "premium" cards was an act of authorship meriting copyright protection. Later, in *Financial Information, Inc. v. Moody's Investors Service, Inc.*, 751 F.2d 501, 507 (2d Cir. 1984), the court held that it was a factual question, to be determined at trial, as to

whether the degree of "selectivity" involved in creating a compilation was sufficient to merit copyright protection. By contrast, the court in the instant case made no mention of the degree of selectivity exercised by petitioner in authoring his two books, and assumed instead that the only relevant inquiry was whether or not the entire compilation had been appropriated.

In *Educational Testing Services v. Katzman*, 793 F.2d 533 (3d Cir. 1986), the Third Circuit found that the copyright in a compilation of standardized test questions and answers could be infringed by the copying of a "handful of questions out of thousands." *Id.*, 793 F.2d at 542. The court thus assumed that a compilation could be infringed by the copying of less than the complete or entire selection of factual material. Instead the court held that the proper inquiry was upon the "qualitative value of the copied material, both to the originator and to the plagiarist." *Id., quoting, Harper & Row Publishers, supra*, 105 S.Ct. at 2233. The holding thus differs markedly from the Ninth Circuit's opinion in the instant case, where no consideration was given to the qualitative value of the copied material to either petitioner or respondents.

The Seventh Circuit's leading case on compilations, *Schroeder v. William Morrow & Co*, 566 F.2d 3 (7th Cir. 1977) involved the copyright in a gardening directory. The defendant had copied only the names and addresses of suppliers from plaintiff's directory, leaving out descriptive material that accompanied the names and addresses in plaintiff's work. The court held that the copyright in plaintiff's compilation included the "selection, ordering and arrangement" of the names and addresses, and found infringement. *Id.*, 566 F,2d at 6. This Court cited *Schroeder* approvingly in the *Harper & Row Publishers* decision. *Harper & Row Publishers, supra*, 471 U.S. at 547, 105 S.Ct. at 2224, 85 L.Ed.2d at 599. The court below refused to find

any copyright in the selection of petitioner's factual materials, contrary to the teaching in *Schroeder*.

Finally in *West Publishing Co. v. Mead Data Central, Inc.*, 799 F.2d 1219 (8th Cir. 1986), the Eighth Circuit found that the copyright in a compilation, which includes the "arrangement" of material, could be infringed by a rival compilation. The court held that the arrangements of cases produced by West's legal publishing company involved "considerable labor, talent and judgment" that merited copyright protection as original works of authorship. *Id.*, 799 F.2d at 1226-27. In the instant case, the Ninth Circuit essentially found that petitioner's selection of thousands of trivial facts was not deserving of copyright protection, even though it is obvious that petitioner's "labor, talent and judgment" in assembling his works involved considerably more creativity than the editors exhibited in the *West Publishing Co.* case.

The courts of appeal outside the Ninth Circuit have been more expansive in interpreting the rights held by authors of compilation works. The decision of the court below raises conflicts with the law in other circuits, in that it severely restricts the protection afforded by the Copyright Act to authors of compilations, such as petitioner.

III

THE NINTH CIRCUIT'S OPINION IMPROPERLY USURPED THE ROLE OF THE TRIER OF FACT IN COPYRIGHT CASES

In affirming the district court's grant of summary judgment in favor of respondents, the Ninth Circuit held that no substantial similarity of expression existed between petitioner's books and respondents' game cards. In doing so, it purportedly applied what has been denominated in

previous Ninth Circuit opinions as the "two-pronged" test, first enunciated in the case of *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977). The court focused upon the second prong of the *Krofft* test, the "intrinsic" test. Under the intrinsic test as stated in *Krofft*, the "trier of fact must decide whether there is substantial similarity in the expressions of the ideas so as to constitute infringement." *Id.* It depends "upon the response of ordinary reasonable person." *Id.* "Analytic dissection and expert testimony are not appropriate." *Id.* It "is uniquely suited for determination by the trier of fact." *Id.*, 562 F.2d at 1166.

Having stated its intention to apply the *Krofft* test, the court below then proceeded to state that factual works, as opposed to fictional works, were different, and proceeded to ignore the *Krofft* holding. The court's reasoning derived from unsupported dicta in the case of *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485 (9th Cir. 1984), to the effect that authors of factual works are "usually confined to a narrow range of expression" so that "similarity of expressions may have to amount to verbatim reproduction or very close paraphrasing before a factual work will be deemed infringed." *Id.*, 736 F.2d at 488. The *Landsberg* dicta was itself at odds with the *Krofft* opinion. In *Krofft*, the court held that there was no special standard of similarity required to prove infringement of "things," citing with approval, cases involving model airplanes, statuettes, and catalogues. *Krofft, supra*, 562 F.2d at 1168-69. The court went on to say "[T]he facts about a historical figure are available for all to use. But if the expression of those facts in a biography is substantially copied infringement will be found." *Id.* 562 F.2d at 1170. Finally, in dismissing a first amendment argument for lesser protection of factual works, the *Krofft* court stated "Because *there are available alternatives in the form of*

expressing any verbal ideas, first amendment considerations should not limit copyright protection in this area." *Id.*, 562 F.2d at 1171, note 17 (emphasis added).

Landsberg's dicta regarding the scope of protection available to factual works has received academic criticism. *See*, Patry, *Copyright In Collections Of Facts: A Reply*, 6 Communications And The Law, No. 5, at p.39 (1984); *See also*, Ginsburg, *Sabotaging And Reconstructing History: A Comment On The Scope Of Copyright Protection In Works Of History After Hoehling v. Universal City Studios*, 29 J. Copyright Soc'y 647, 650 (1982).

The court below has effectively precluded the trier of fact from any part of the decision-making process to determine copyright infringement. In finding that the taking of petitioner's literal forms of expression was the copying of only "indispensable" expression of facts or ideas, the court was arrogating to itself the role of the trier of fact. In finding that no infringement of petitioner's selection had occurred, despite the copying of 3,231 facts from *Super Trivia I* and 745 facts from *Super Trivia II*, the court was abandoning the principle that the question of whether substantial similarity exists between two works is "uniquely suited for determination by the trier of fact." *Krofft, supra*, 562 F.2d at 1166. The court below was effectively extending a fair use defense to the respondents in this case (although it never articulated its analysis as such); however, this Court has held that fair use is to be applied on a case-by-case basis, rather than on a blanket basis to particular categories of works. *Harper & Row Publishers, supra*, 471 U.S. at 549, 105 S.Ct. at 2225, 85 L.Ed. 2d at 600.

This Court has never articulated the precise parameters of the analysis required to be undertaken by a court in deciding a motion for summary judgment, and particularly in deciding the issue of substantial similarity under copyright law in the summary judgment context. The

Krofft test has never been reviewed by this Court, nor has the Court reviewed any of the decisional law on the subject, which dates back to the leading Second Circuit decision in *Arnstein v. Porter*, 154 F.2d 465 (2d Cir. 1946), in which Judge Frank, with Judge Learned Hand's joinder, warned that summary judgment should not be used in copyright cases unless the absence of similarities between the works in question is patent. *Id.*, 154 F.2d at 473.

The decision of the Ninth Circuit in the instant case is a departure from the *Arnstein* and *Krofft* court's holdings regarding "substantial similarity" on summary judgment motions.

The decision allows either the trial or appellate court to decide whether a particular copying is substantial, or if it constitutes fair use under copyright law. These questions are, at least in part, questions of fact that a trier of fact, and not a court, should resolve.

Given the unclear state of law regarding the proper role of judge or jury in copyright cases, petitioner submits that the Court should grant the writ herein to resolve this important question of federal law.

CONCLUSIONS

For the reasons articulated, this petition for certiorari should be granted. Petitioner's copyrighted compilations are deserving of a greater scope of protection that the Ninth Circuit has allowed. The court should clarify this important issue of Federal law, and in doing so, resolve the apparent division in the circuit courts on the extent of copyright protection available to nonfiction compilations. The court should also definitively set for the proper functions of judge and jury in reviewing motions for summary judgment in copyright actions.

Dated: January 28, 1988

Respectfully submitted,

WEINSTEIN AND HART

By: JOSEPH F. HART, ESQ.

Attorneys for Petitioner
FRED L. WORTH

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRED L. WORTH, *Plaintiff-Appellant,* v. SELCHOW & RIGHTER COMPANY, HORN ABBOT, LTD., *Defendants-Appellees.*	No. 86-5909 D.C. No. CV 84-8220-WMB OPINION

Argued and Submitted
July 9, 1987—Pasadena, California

Filed September 8, 1987

Before: Dorothy W. Nelson, Cynthia Holcomb Hall and David R. Thompson, Circuit Judges.

Opinion by Judge Nelson

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, Jr., District Judge Presiding

SUMMARY

Copyright, Patent and Trademark

Appeal from grant of summary judgment. Affirmed.

This action arises from appellant Worth's compilation of trivia in two works. He filed suit against the makers and marketers of the game *Trivial Pursuit* alleging that their use of his

books as part of their references for their trivia questions constituted a copyright infringement. The district court granted summary judgment in favor of appellees.

[1] Although summary judgment is disfavored on the substantial similarity issue in copyright cases, it is allowed where no reasonable jury could find substantial similarity of both ideas an expression between the works at issue. **[2]** Similarity of expression may have to amount to verbatim reproduction or very close paraphrasing before a factual work will be deemed infringed. **[3]** Although Worth's books may have been a major reference source for the authors of Trivial Pursuit, there was no bodily appropriation of Worth's selection of the factual entries.

COUNSEL

Joseph F. Hart, Beverly Hills, California, for the appellant.

James P. Ryther, Chicago, Illinois, for the appellee.

OPINION

NELSON, Circuit Judge:

Fred L. Worth, the author of two encyclopedias on trivia, appeals the district court's grant of summary judgment, and denial of his concurrent motion for partial summary judgment, on a copyright infringement claim against the designers and marketers of the game *Trivial Pursuit*. We note jurisdiction under 28 U.S.C. § 1291 (1982) and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Fred L. Worth, a California resident, is the author and owner of all rights in two books on trivia entitled *The Com-*

plete Unabridged Super Trivia Encyclopedia ("Super Trivia I"), and *The Complete Unabridged Super Trivia Encyclopedia, Volume II,* ("Super Trivia II"). Worth's books are compilations of facts, alphabetically arranged under headings that are followed by explanations of the particular entry. Each book contains 6,000 entries. Worth allegedly derived the information from books, films, and television shows after extensive research. The two volumes were first published in 1977 and 1981, respectively, and were registered in the copyright office in 1984. Worth's purpose for writing the books, as expressed in the introduction to his first book, was "one, to compile in one reference work a collection of interesting and trivial facts; and second, to collect interesting and perhaps not so trivial facts, facts that are difficult to find."

Worth alleges that Horn Abbot, Ltd., and its principals, the designers of the game *Trivial Pursuit,* and Selchow & Righter Company ("Selchow"), the marketer of the game, infringed the copyright in his books in their "Genus," "Baby Boomer," and "Silver Screen," editions of the game. *Trivial Pursuit* is a board game utilizing question and answer cards, in which the object of the game is to answer correctly "trivia questions" in various subject areas in order to roll the dice, advance around the board, and collect color-coded wedges. Each edition of the game contains 6000 questions and answers arranged on 1000 cards. The game tests the players' knowledge of facts in areas such as geography, art, literature, sports, and history (the subjects vary with each edition), and is designed to be entertaining.

Worth contends that 1,675 questions (27.9%) in the Genus edition were taken from *Super Trivia I,* 1,293 questions (21.6%) in the Silver Screen edition were taken from *Super Trivia I* and/or *II,* and 828 questions (13.8%) in the Baby Boomer edition were taken from *Super Trivia I* and/or *II.*[1]

[1]Worth's calculations demonstrate the number of times the authors of the game's questions and answers allegedly used his books as a factual

The following example is representative of the use of Worth's books:

Worth's entry:

Abel, Colonel Rudolf

Russian spy exchanged February 10, 1962 for F. Gary Powers, U-2 pilot.

Game Card

Q. What Russian spy was exchanged for U-2 pilot Gary Powers in 1962?

A. Rudolf Abel.

The original creators of the game, Chris Haney and Scott Abbott, do not deny consulting Worth's books in the development of their board game. They merely state that Worth's books were among numerous reference sources they consulted in developing *Trivial Pursuit* (including other books, newspapers, television, radio, theater, and their own general knowledge).

The game was first conceived in 1979. John Haney participated in the early game development along with Chris Haney

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source. However, to the extent that Worth intends to indicate the quantitative relation of similar material in the works, the relevant inquiry is whether a substantial portion of the protectible material in the *plaintiff's* work was appropriated — not whether a substantial portion of *defendant's* work was derived from plaintiff's work. *See Atari, Inc. v. North Am. Philips Consumer Elec. Corp.*, 672 F.2d 607, 619 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982)); 3 Nimmer, *Nimmer on Copyright* § 13.03[A], at 13-36 & n.54 (1986). In any event, assuming that particular material is copyrightable, a determination of the qualitative importance of the material to the plaintiff's work is more significant than a quantitative calculation of the portion allegedly appropriated by the defendant. *See* 3 Nimmer, *supra*, § 13.03[A], at 13-37.

and Scott Abbot. In April, 1981, the three originators, together with Ed Werner, formed a Canadian corporation, Horn Abbot, Ltd., to market *Trivial Pursuit*. Abbot and Chris Haney assigned their rights to the corporation, and Horn Abbot, Ltd., obtained a Canadian copyright in the game. In November, 1982, Horn Abbot, Ltd., signed an agreement with Selchow to distribute *Trivial Pursuit* in the United States. By the end of 1984, sales volume for the game reached $256 million.

In October, 1984, Worth initiated a suit against Horn Abbot, Ltd., Selchow, Chris and John Haney, Scott Abbott, and Ed Werner, alleging copyright infringement and unfair competition and requesting $300 million in damages. The individual defendants (all Canadian residents) filed a motion to dismiss for lack of personal jurisdiction, which the district court granted on March 22, 1985.[2] The remaining parties filed cross-motions for summary judgment: The defendants moved for summary judgment on both the copyright infringement and unfair competition claims; Worth sought partial summary judgment only on the copyright infringement claim.[3] The court granted the defendants' motion and denied Worth's motion. Worth timely appealed.

ISSUE PRESENTED

Whether the district court erred in granting summary judgment in favor of the defendants on the copyright infringement claim.

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[2]Worth also appeals the district court's order granting the individual defendants' motion to dismiss for lack of personal jurisdiction. Because we affirm the district court's summary judgment in favor of the corporate defendants on the merits, we do not reach the question of personal jurisdiction over the individual defendants.

[3]On appeal, Worth continues to confine his argument to the copyright infringement claim.

DISCUSSION

I. *Standard of Review*

[1] Summary judgments in copyright infringement actions are reviewed de novo. *Frybarger v. International Business Machines Corp.*, 812 F.2d 525, 528 (9th Cir. 1987). Although summary judgment is disfavored on the substantial similarity issue in copyright cases, *id.*, it is "clearly appropriate . . . if, after viewing the evidence and drawing every inference in the light most favorable to the nonmoving party, the court concludes that no reasonable jury could find substantial similarity of both ideas and expression between the works at issue." *Id.* For examples of Ninth Circuit cases affirming summary judgment on the substantial similarity issue, see, *id.* at 527; *Berkic v. Crichton*, 761 F.2d 1289, 1291 (9th Cir.), *cert. denied*, 106 S. Ct. 85 (1985); *Litchfield v. Spielberg*, 736 F.2d 1352, 1354 (9th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985); *See v. Durang*, 711 F.2d 141, 142 (9th Cir. 1983). The plaintiff bears the burden of proving substantial similarity. *Frybarger*, 812 F.2d at 528.

II. *Analysis*

To establish copyright infringement, the plaintiff must prove ownership of the work in question, access to the work by the defendant, and substantial similarity of both the general ideas *and* the expression of those ideas between the plaintiff's and defendant's work. *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977); *see also Frybarger*, 812 F.2d at 529. For the purposes of the summary judgment motion, the defendants conceded Worth's copyright ownership and defendants' access to Worth's books. Our review, therefore, focuses on the issue of substantial similarity.

This circuit applies an "extrinsic test" to determine substantial similarity of ideas between two works. *Berkic*, 761

F.2d at 1292; *Krofft*, 562 F.2d at 1164. The test focuses on a comparison of the objective details of the works. *Litchfield*, 736 F.2d at 1356. Although the plaintiff is required to establish that the ideas in the works are substantially similar to prevail in a copyright infringement claim, the ideas alone are not copyrightable. 17 U.S.C. § 102(b) (1982) ("In no case does copyright protection for an original work of authorship extend to any idea, ... concept, ... or discovery ...."); *Frybarger*, 812 F.2d at 529. Therefore, if the similarities between two works are confined to nonprotectible ideas, there is no infringing similarity. *Id.*

The district court found that even if the ideas are substantially similar in Worth's books and *Trivial Pursuit*, the expression in the game is not substantially similar to the protectible expression in the books. It therefore did not apply the extrinsic test and confined its analysis to the expression prong of the *Krofft* test. *See Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984) ("Similarity of expression must be established because it is an axiom of copyright law that copyright protects only an author's expression of an idea and not the idea itself.").

To determine substantial similarity of expression, this circuit applies a subjective, "intrinsic" test. *Berkic*, 761 F.2d at 1292; *Krofft*, 562 F.2d at 1164. The test focuses on "whether 'an ordinary reasonable person' ... would find that the 'total concept and feel' of the works showed substantial similarity." *Cooling Sys. & Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485, 492 n.9 (9th Cir. 1985) (quoting *Krofft*, 562 F.2d at 1164 and *Litchfield*, 736 F.2d at 1357).

Worth asserts that because his books were used as a reference source for a certain percentage of the questions and answers in defendants' game cards, and because certain words were repeated, that the expression in the books and

game cards is substantially similar.[4] He further contends that the game cards infringed his selection and arrangement of the facts, which is protected by the copyright in his compilation.[5] Although selection and arrangement may constitute original authorship in compilations, 1 M. Nimmer, *Nimmer on Copyright* § 3.04, at 3-20, Worth's analysis of the expression prong of the substantial similarity test reveals a misapprehension of the scope of copyright protection.

[2] Factual works receive distinct treatment from fictional works under copyright law. *Landsberg*, 736 F.2d at 488. Indeed, facts, like ideas, are never protected by copyright law. *Cooling Sys.*, 777 F.2d at 491; *see also* 17 U.S.C. § 102(b) (1982) (expressly excluding discoveries from the scope of copyright protection). Because authors who wish to express ideas in factual works are usually confined to a "narrow range of expression . . . , similarity of expression may have to amount to verbatim reproduction or very close paraphrasing before a factual work will be deemed infringed." *Landsberg*, 736 F.2d at 488. Fictional works, in contrast, which may be expressed with "infinite variations," enjoy a broader protection; a verbatim copy or close paraphrase is not a necessary element to establish infringement. *Id.* Worth cannot prevail in his claim without showing that the *Trivial Pursuit* game cards derived from his expression "something more than what 'must unavoidably be produced by anyone who wishes to use and restate' the facts that form the greater part of the work." *Cooling Sys.*, 777 F.2d at 492 (quoting *Landsberg*, 736 F.2d at 489).

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[4] *See supra* note 1.

[5] The Copyright Act of 1976 defines a "compilation" as

> a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.

17 U.S.C. § 101 (1982).

It is clear, then, that the use of the factual content in Worth's books does not constitute infringement. "The discovery of a fact, regardless of the quantum of labor and expense, is simply not the work of an author." 1 M. Nimmer, *supra*, § 2.11[E], at 2-169. The verbatim repetition of certain words in order to use the nonprotectible facts is also noninfringing: the game cards' repetition of words used by Worth to describe places, persons, and events constitutes "mere *indispensable* expression" of particular facts or ideas. *See Frybarger*, 812 F.2d at 530 (emphasis in original). If we were to hold otherwise, we would, in effect, extend copyright protection to the facts contained in Worth's books. *See Landsberg*, 736 F.2d at 489 (noting that because of the unavoidable expression required to restate the nonprotectible ideas in plaintiff's work, a finding of infringing similarity of expression would effectively grant a copyright in the work's nonprotectible ideas).

[3] The arrangement of Worth's book was not copied: His factual entries are arranged in alphabetical order; the *Trivial Pursuit* questions and answers are organized and color-coded by subject matter and are randomly arranged on each game card. As for the selection, although Worth's books were the source for many questions, the entire selection of facts in the books and game cards is not substantially similar. Factual works are not infringed in the absence of " 'bodily appropriat[ion]' " of expression. *Landsberg*, 736 F.2d at 489 (quoting *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 980 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980)). Although Worth's books may have been a major reference source for the authors of *Trivial Pursuit*, there was no "bodily appropriation" of Worth's "selection" of 12,000 factual entries. According to Worth's own calculations, only a certain percentage of his factual entries were used as the basis for game card questions.[6]

[6]Worth alleges that 3,796 questions and answers in *Trivial Pursuit* correspond to factual entries in his works. Therefore, 3,976 out of 12,000 factual entries contained in Worth's two books provided source material for the game cards. Clearly, Worth's complete "selection" of facts was not appropriated.

Worth's reliance on cases involving infringement of one directory by another, *see, e.g., Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484 (9th Cir. 1937) (telephone directories), or one list by another, *see, e.g., Eckes v. Card Prices Update*, 736 F.2d 859 (2d Cir. 1984), is not persuasive. In *Leon*, plaintiff's entire selection of names and numbers were copied and listed in numerical instead of alphabetical order. *Leon*, 91 F.2d at 484-85. In *Eckes*, the plaintiff published a list of 18,000 common baseball cards and selected 5,000 of those cards as "premium" cards; the defendant's listing selected substantially the same 5,000 cards as "premium" cards. *Eckes*, 736 F.2d at 860-61.

In addition, to the extent that *Leon* suggests that research or labor is protectible, later cases have rejected that theory. *See, e.g., Landsberg*, 736 F.2d at 489 (approving Second Circuit case holding that a movie studio's subsequent use of author's research and theory on the Hindenberg explosion was noninfringing absent wholesale appropriation of the work) (citing *Hoehling*, 618 F.2d 972); *Eckes*, 736 F.2d at 862 (noting that "sweat of a researcher's brow" does not merit copyright protection); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368-70 (5th Cir. 1981) (holding that research involved in obtaining facts is not copyrightable and noting that the directory cases have been accorded special protection not applicable to other factual works) (cited following *Hoehling* discussion in *Landsberg*, 736 F.2d at 489); 1 M. Nimmer, *supra*, § 3.04, at 3-20 (according copyright protection to research "distorts basic copyright principles" by creating a "monopoly in public domain materials"). As the Second Circuit has observed:

> We . . . cannot subscribe to the view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior published material. . . . It is just such wasted effort that the proscription against the copyright of ideas and facts,

> and to a lesser extent the privilege of fair use, are designed to prevent.

Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 310 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (citations omitted) (*quoted in Miller*, 650 F.2d at 1371); *see also Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550 n.3 (1985) (noting that " 'rigid application of the copyright statute' " may " 'stifle the very creativity which that law is designed to foster' ") (quoting *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980)).

Finally, this circuit has noted that it is "entirely appropriate to view the individual similarities together and in context since . . . substantial similarity in the expression of an idea may appear from the mood evoked by the work as a whole." *Durang*, 711 F.2d at 144. In addition, the *Litchfield* court noted that "[t]o constitute infringement of expression, the total concept and feel of the works must be substantially similar."[7] *Litchfield*, 736 F.2d at 1357; *see also Baxter*, 812 F.2d at 424; *Cooling Sys.*, 777 F.2d at 492 n.9. Viewing the two works in context and for overall "mood" or "concept and feel," highlights the lack of substantial similarity in expression between Worth's trivia encyclopedias and the *Trivial Pursuit* game cards.

CONCLUSION

The district court's grant of summary judgment on the copyright infringement claim in favor of the defendants and

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[7]In his treatise, Professor Nimmer commented on the proper application of the "total concept and feel" test. He observed that "[i]t should not be understood to mean that what would otherwise constitute an actionable similarity is rendered defensible because of a different 'concept and feel.' " 3 Nimmer, *supra*, § 13.03[A], at 13-30. In this case, we find no substantial similarity of protectible expression *or* of "concept and feel." We therefore are not confronted with the concern raised by Professor Nimmer.

denial of cross-motion for partial summary judgment on that claim by the plaintiff is AFFIRMED.

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APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED, AUG 20, 1986
ENTERED, AUG 21, 1986
Clerk, U.S. District Court
Central District Of California
By _____ Deputy

FRED L. WORTH, Plaintiff, v. SELCHOW & RIGHTER COMPANY, New York corporation; HORN ABBOT, LTD., a Canadian corporation, Defendants.	Civil No. 84-8220-WMB ORDER RE CROSS-MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on defendants' motion for summary, and plaintiff's cross-motion for partial summary judgment.

FACTUAL SUMMARY

Plaintiff, Fred Worth, is the owner of all rights in Volumes I and II of The Complete Unabridged Super

Trivia Encyclopedia (Super Trivia I and II), copyrighted in 1977 and 1981 respectively. Defendants Horn Abbot, Inc., and Selchow & Righter are, respectively, the designer and marketer of the board game Trivial Pursuit.

Plaintiff alleges that three editions of the game each infringe his copyrights in Super Trivia I and/or Super Trivia II. Specifically, the "Genus" edition is said to infringe Super Trivia I, and the "Silver Screen" and "Baby Boomer" editions allegedly infringe Super Trivia I and Super Trivia II.

Plaintiff's books are directed toward the public's interest in trivia about persons, places, and things.[1] They are compilations, with entries presented in alphabetical order, each

entry then followed by a brief statement of related facts. Plaintiff alleges he spent tens of thousand of hours of research compiling the material used in his works. His sources included books, films, and television shows.

Trivia Pursuit is played on a board displaying a wheel-shapped patern, with each landing space representing a category of questions. Each player has a token which moves around the board according to the roll of the dice. The object of the game is to collect color-coded wedges by moving around the board and correctly answering trivia questions in selected categories.

There are 1000 cards in each edition of the game. Every card has a single question and answer in each of

the six assigned subject categories in the editions of the game (for example, in the Genus edition the categories are Geography, Entertainment, History, Art & Literature, Science & Nature, and Sports and Leisure). The game, turning on the players' ability to answer questions in each category, thus tests and rewards the participants' knowledge of trivia.

The designers collected questions on subjects of general interest, and wanted the average player to be able to answer about half of them. The questions were drafted to be short and entertaining.

Plaintiff contends that no less than 1,675 questions in the Genus edition were taken from Super Trivia I, 1,293 questions in the "Silver Screen" edition were taken from Super

Trivia I and/or Super Trivia II, and 828 questions in the "Baby Boomer" edition were taken from Super Trivia I and/or Super Trivia II. Thus, plaintiff contends that 28 percent of the questions in the Genus edition, 21.6 percent of those in the Silver Screen edition, and 13.8 percent of those in the Baby Boomer edition were taken from his works. The defendants argue that a smaller number of questions were taken, but for the purposes of these motions the Court will assume that the defendants derived the questions in the numbers submitted by plaintiff.[2]

DISCUSSION

A. Copyright Infringement

To establish infringement, plaintiff must prove ownership of the copyright, access to the copyrighted

work, and "substantial similarity not only of the general ideas [in the work] but of the expressions of those ideas as well." Sid and Marty Krofft Television v. Mcdonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).

"Summary judgment is proper if reasonable minds could not differ as to the presence or absence of substantial similarity of expression." See v. Durang, 711 F.2d 141, 143 (9th Cir. 1983) (citations omitted). For the purposes of this summary judgment motion, defendants admit plaintiff's books have a valid copyright, and that they were used in drafting some of the questions for the game. The remaining issue then is whether the relationship between plaintiff's books and defendants' game can be characterized as one of

"substantial similarity."

Copyright law protects not the facts and ideas contained in published works but only their expression. Cooling Systems and Flexibles v. Stuart Radiator, 777 F.2d 485, 491 (9th Cir. 1985). As a result, "the degree of substantial similarity required to show infringement varies according to the type of work and the ideas expressed in it." Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488 (9th Cir.), cert. denied 105 S. Ct. 513 (1984). Works of fiction, whose mode and form of expression is limited only by the author's imagination, enjoy a broad protection; a new work need not be a close copy or paraphrase in order to infringe. Id. In works of fact, on the other hand, the ideas may be

susceptible to only a narrow range of expression, and "similarity of expression may have to amount to verbatim reproduction or very close paraphrase before a factual work will be deemed infringed. Id.[3]

Plaintiff's books are compilations of annotated terms or phrases, alphabetically arranged. To prevail he must show that the use of his expression was something more than what "'must unavoidably be produced by anyone who wishes to use and restate the facts that form the greater part of the work.'" Cooling Systems and Flexibles v. Stuart Radiator, supra, 777 F.2d at 492 (quoting Landsberg v. Scrabble Crossword Puzzle Game Players, Inc., supra, 736 F.2d at 489).

The plaintiff has submitted to the Court charts detailing the

questions in Trivial Pursuit allegedly taken from the entries in Super Trivia I and Super Trivia II. The following is a representative sample of plaintiff's entries and defendants' questions and answers:

I. Pussy Galore
Goldfinger's lesbian accomplice who runs a flying school for female pilots (1964 movie Goldfinger): played by Honor Blackman.

Q: What kind of school did Pussy Galore run?
A: A flying school.

II. Constantinople
Former name for Istanbul (Turkey): officially changed March 28, 1930, to name used as early as 1453.

Q: What's the former name of Istanbul?
A: Constantinople.

III. Michael J.
Doonesbury's first name and initial (comic strip Doonesbury by G.B. Trudeau).

Q: What's Doonesbury's first name?
A: Michael

IV. Abel, Colonel Rudolf
Russian spy exchanged
February 10, 1962 for
F.Gary Powers, U-2
pilot.

Q: What Russian spy was
exchanged for U-2 pilot
Gary Powers in 1962?
A: Rudolf Abel.

The similarities before the Court fail to demonstrate that defendants made use of plaintiff's expression beyond that necessary to state the facts in his books. One is hard-pressed to imagine how the defendants could draft questions based on the facts in plaintiff's books without repeating most of his terms. The defendants' game questions also do not reproduce the arrangement of facts in plaintiff's books. Super Trivia I and II are arranged alphabetically, while defendants have organized their questions by category, and randomly

within each category.

Plaintiff relies on authority finding infringement in the copying of lists. See, e.g., Leon v. Pacific Telephone & Telegraphy Co., 91 F.2d 484 (9th Cir. 1937) (telephone directory); Schroeder v. William Morrow & Co., 566 F.2d 3 (2nd Cir. 1977) (list of gardening suppliers); Eckes v. Card Prices Update, 736 F.2d 859 (2nd Cir. 1984) (list of premium baseball cards).

In Leon v. Pacific Telephone & Telegraph Co., supra, the defendant copied plaintiff's telephone directory, merely inverting the names and addresses. The court found infringement in the face of a "fair use" defense, noting defendant had cited no authority for the "wholesale copying and publication of copyrighted

material." 91 F.2d at 486. Defendant also argued that since the "inverted" directory had a purpose different from plaintiffs', there was no infringement. The court disagreed, finding infringement because the defendants had appropriated the plaintiffs' labor for their own use, and

> even if they have injured the plaintiffs in no other way, they have at any rate deprived them of the advantage, which their copyright conferred on them, of being able to publish such a book as the defendants' book at much less labor and expense than anyone else.

91 F.2d at 486 (quoting Weatherby & Sons v. International Horce Agency and Exchange, Ltd., [1910] 2 Ch. 297, 304).

In contrast to Leon, defendants here did not use one list to produce another. Instead, they used plaintiff's books of alphabetized

entries to draft questions which are randomly arranged on the game cards. More importantly, however, to the extent Leon asserts that the use of the labor of another constitutes copyright infringement it is at odds with more recent decisions in this and other Circuits.

In Landsberg v. Scrabble Crossword Game Players, Inc., supra, Landsberg had developed a strategy for playing Scrabble. He wrote a manuscript setting out his theory, and submitted it to Selchow and Righter (owner of the Scrabble trademark) to gain permission to use the term Scrabble in his work. Landsberg then entered into negotiations with Selchow and Righter for rights in his manuscript. During the negotiations, Selchow had another writer, working

from Landsberg's manuscript, draft its own Handbook for playing Scrabble. Selchow had paraphrased a significant part of Landsberg's work and had created a Handbook "substantially similar" to Landsberg's manuscript. The district court found Selchow had access to the manuscript and had "engaged in wholesale copying of both Landsberg's ideas and the form of expression that he used in his manuscript." 736 F.2d at 487.

The Ninth Circuit reversed a finding of infringement, holding that any similarities between the works were

> "no more than [what] must unavoidably be produced by anyone who wishes to use and restate the unprotectable ideas contained in Landsberg's work. If we were to hold S&R's work to be an infringement, we do not see how anyone could state Landsberg's ideas

> without also being held to have infringed. Landsberg would in effect have obtained a coyright on the ideas contained in his work."

736 F.2d at 485 (emphasis added). Far from finding that the misappropriation of the fruits of one's labor itself constituted copyright infringement, the court found no infringement, notwithstanding the use made of Landsberg's work.[4] See also Hoehling v. Universal City Studios, 618 F.2d 972, 980 (2nd Cir.) cert. denied 449 U.S. 841 (1980) ("In works devoted to historical subjects, it is our view that second author may make significant use of prior work, so long as he does not bodily appropriate the expression of another."); Miller v. Universal City, 650 F.2d 1365, 1368-72 (5th Cir. 1981) (research not

copyrightable).[5] The defendants here could not be held to have "bodily appropriated" plaintiff's work.

Plaintiff also argues that the defendants have infringed his selection of facts. In Eckes v. Card Prices Update, supra, the plaintiffs had published a list of around 5000 "premium" baseball cards. The defendants copied that list in their publication which gave monthly updates on card prices. The Second Circuit found that in selecting particular cards as premium cards, the plaintiffs had exercised "selection, creativity, and judgment." 736 F.2d at 863. Therefore, in copying the list, defendants had "infringed the protected expression" contained in plaintiffs'list. Id. at 864. See also Dow Jones & Co. v. Bd. of Trade

of City of Chicago, 546 F. Supp. 113, 118 (S.D.N.Y. 1982) (judgment in including stocks on Dow Jones list is copyrightable element).

Here, plaintiff argues that his selection of what to include as "trivia" in his books is copyrightable, and therefore in using his facts defendants infringe. This must fail, because copyright protects only the expression of ideas or facts, and not the facts themselves. Plaintiff's alleged "expression" is the selection and arrangement of these facts into a list of terms with annotations, organized alphabetically. The judgment involved is insufficient to trigger the protection of copyright. Unlike the selection cases noted above, there is no independent significance to the fact that plaintiff chose to include

particular trivia in his books.

Were the defendants to have themselves developed a list or compilation similar to plaintiff's and used the facts in plaintiff's books, an action for infringement might lie, not because the facts were identical, but because their expression, in alphabetical lists of annotated entries, was substantially similar. If the defendants' use of plaintiff's books here constitutes copyright infringement, the plaintiff will have succeeded in copyrighting the facts in his books. Cf. Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d at 485 ("Landsberg would in effect have obtained a copyright on the ideas contained in his work.").

Because they are in essence collections of facts , works of

trivia enjoy only narrow protection under copyright law. The similarities between plaintiffs' books and defendants' game do not reach the restricted range of plaintiff's protected expression. Summary judgment is therefore granted for defendants on the copyright claim.

B. State Law Claims

Section 301(a) of the Copyright Act establishes that in certain circumstances federal copyright law preempts state law.[6] Plaintiff alleges that defendants misappropriated his research in drafting the questions on the cards. Defendants argue plaintiff's state law claims are preempted.

In Oddo v. Ries, 743 F.2d 630, 635 (9th Cir. 1984), the Ninth Circuit put the test for preemption this way:

> "Section 301(a) preempts a state-created right if that right 'may be abridged by an act which, in and of itself, would infringe one of the exclusive rights [listed in Section 106].' Harper & Row, Publishers v. Nation Enterprises, 723 F.2d 195, 200 (2d Cir. 1983), [rev'd on other grounds, ___ U.S. ___, 105 S. Ct. 2218 (1985)]. But if violation of the state right is 'predicated upon an act incorporating elements beyond mere reproduction or the like,' id., there is no preemption."

Cases finding a state law claim not preempted by the federal law have included an "extra element." Thus, Oddo v. Ries, supra, the plaintiff alleged conversion of his manuscript, as well as breach of fiduciary duty. Similarly, in Landsberg v. Scrabble Crossword Game Players, Inc., supra, the Ninth Circuit said Landsberg might have a claim, based upon an

implied-in-fact contract, that would not be preempted. 736 F.2d 489-90. Cf. Durham Industries, Inc. v. Tomy Corp., 630 F.2d 905, 918-19 (2d Cir. 1980) (to extent unfair competition claim is for copying, it is preempted by Section 301).

Here, Worth alleged no acts other than using his books to draft questions for the game. He attempts to avoid preemption by arguing that defendants' acts go beyond "mere reproduction" because "[d]efendants have effectively arrogated the years of effort which Mr. Worth put into his books, by using his factual material to compose questions in a three-month period." This misses the point; the relevant question for preemption in this context is the acts of defendants, not plaintiff.[7] Federal

copyright law refuses to protect works such as Worth's from use such as defendants'. He may not get the protection through the back door, by using state law. Durham Industries, Inc. v. Tomy Corp., supra, 630 F.2d at 916. See also Miller v. Universal City, supra, 650 F.2d at 1372 ("There is no rational basis for distinguishing between facts and the research involved in obtaining facts. To hold that research is copyrightable is no more or no less than to hold that the facts discovered as a result of research are entitled to copyright protection.")

As the House Report accompanying the Copyright Act stated:

> "The intention of section 301 is to preempt and abolish any rights under the common law or statutes

> of a State that are equivalent to copyright and that extent to works coming within the scope of the Federal copyright law. The declaration of this principle in section 301 is intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal Protection."

H.R.Rep. No. 1476, 94th Cong., 2d Sess. 130, reprinted in 1976 Code Cong. & Ad. News, 5659, 5746.

Plaintiff's state law claim for unfair competition /misappropriation is therefore preempted.

CONCLUSION AND ORDER

There remaining no genuine issue of material fact, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

(1) That defendants' motion for summary judgment is GRANTED in its entirety;

(2) that plaintiff' cross-motion of partial summary judgment is DENIED.

This Order constitutes the Findings of Fact and Conclusions of Law of the Court.

DATED: 20 Aug 1986

Wm. Matthew Byrne, Jr.
Wm. Matthew Byrne, Jr.
United States District Judge

Footnote No. 1 Reference Page 2

The plaintiff states his purpose in writing the books in this terms:

> "[O]ne, to compile in one reference work a collection of interesting and trivial facts; and second, to collect interesting and perhaps not so trivial facts, facts that are

difficult to find."
Super Trivia I, "Introduction," p. 9.

Footnote No. 2 Reference Page 3

The defendants in their reply brief state the result should be the same whatever numbers are used.

Footnote No. 3 Reference Page 4

Defendants contend, applying the idea-expression analysis in Sid & Marty Krofft Television v. McDonald's Corp., supra, that the Court need not consider defendants' expression because plaintiff's works are books and therefore their idea obviously differs from defendant's game. On the other hand, since the core of Trivial Pursuit might be said to be the question and answer cards which test one's knowledge of trivia it could be argued that the focus should be restricted to whether the cards share

the same idea as the books. The Court need not decide the issue, because even assuming similarity of idea, the game fails to infringe protected expression, and thus does not meet both prongs of the Krofft test. See infra.

Footnote No. 4 Reference Page 8

Landsberg left undecided whether "a work that rephrased in the same order as the original a substantial part of the ideas in another work might be held to infringe that work as a compilation, see 17 U.S.C. Sections 101, 103, even though none of the rephrasings of the individual ideas would constitute infringement when viewed in isolation." Id. Here there is no claim that the facts used in Trivial Pursuit are arranged in the same order as they were in plaintiff's

books.

Footnote No. 5 Reference Page 8

In Schroeder v. William Morrow & Co., supra, the Seventh Circuit held that one list of gardening suppliers infringed another, because the defendants simply copied the plaintiff's list into their own book, without any independent verification, thereby saving time during a hectic production schedule. That appropriation of another's work was copyright infringement. 566 F.2d at 6 (citing Orgel v. Clark Boardman Co., 301 F.2d 119, 120 (2nd Cir.), cert. denied, 371 U.S. 817 (1962)).

To the degree Schroeder based its finding of infringement on misappropriation of labor, rather than substantial similarity, it is of questionable authority today. The

Second Circuit, source of the authority relied upon in Schroeder, has recently characterized its position on copyright and the labor expended in producing factual works as follows:

> "[We] have been particularly restrictive in the protection of non-fiction works indicating, for example, that the fruits of another's labor in lieu of independent research obtained through the sweat of a researcher's brow, does not merit copyright protection absent, perhaps, wholesale appropriation."

Eckes v. Card Prices Update, 736 F.2d 859 862 (2nd Cir. 1984).

Footnote No. 6 Reference Page 9

17 U.S.C. Section 301(a) states:

> "On and after January 1, 1979, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106

in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after the date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any state."

Footnote No. 7 Reference Page 10

As noted above, copyright law gives only limited protection to the labor of research expended in creating factual works.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED, OCT 30, 1987
Cathy A. Catterson, Clerk
U.S Court of Appeals

FRED L. WORTH,	)	Civil No. 86-5909
Plaintiff-Appellant,	)	
v.	)	DC Nos.
SELCHOW & RIGHTER COMPANY, et al.	)	CV-84-8220-WMB
	)	ORDER
Defendants-Appellees.	)	

Before: NELSON, HALL and THOMPSON, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. The panel voted unanimously to reject the suggestion for a rehearing en banc.

The full court has been advised

of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

APPENDIX D

A

The Scarlet Letter, an "A" embroidered on Hester Prynne's dress, meaning "adulteress" (The Scarlet Letter by Nathaniel Hawthorne)

A.

Mutt's initial when the comic strip "Mutt and Jeff" began in 1907. Bud Fisher, the original artist, titled it "A. Mutt." On June 7, 1908, Russ Westover killed off A. Mutt, only to bring him back to life. His full name, later: Augustus P. Mutt

A1ANA2

Lawrence Welk's California automobile license plate

. . .

Abel, Colonel Rudolf

Russian spy exchanged February 10, 1962 for F. Gary Powers, U-2 pilot

Aberdeen Express

British train robbed of 7 million dollars (in British currency) on August 8, 1963, in what was called The Great Train Robbery

Abraham Lincoln

Frigate on which Ned Land, Professor Pierre Aronnax and Conseil were when it was rammed by the "Nautilus" (Jules Verne's 20,000 Leagues Under the Sea)

Absolute Zero

-273.16°C, which equals -459.69°F

. . .

Jetman

Television cartoon series for which Richard Hollister (Richard

Benjamin) works as a cartoonist (TV series He and She)

Jet Pilot

Race horse that announcer Clem McCarthy said was the winner of the 1947 Preakness before realizing his mistake. The actual winner was Faultless which "Mister Horse Racing" then announced.

Jets and Sharks

Two rival gangs in movie West Side Story (Best Picture, 1961 Academy Awards)

. . .

Pianosa

Mediterranean Island setting of the 256th Squadron (B-25's).

Novel/movie Catch 22 (created by Joseph Heller)

Picadilly, Lilly

B17 in which General Frank Savage (Gregory Peck) flies missions (1949 movie 12 O'Clock High).

Picasso, Pablo

Only living artist who had his work displayed in the Grand Gallery of the Louvre

. . .

Telemachus

Son of Odysseus and Penelope (Homer's Odyssey): he helped his father kill Penelope's suitors

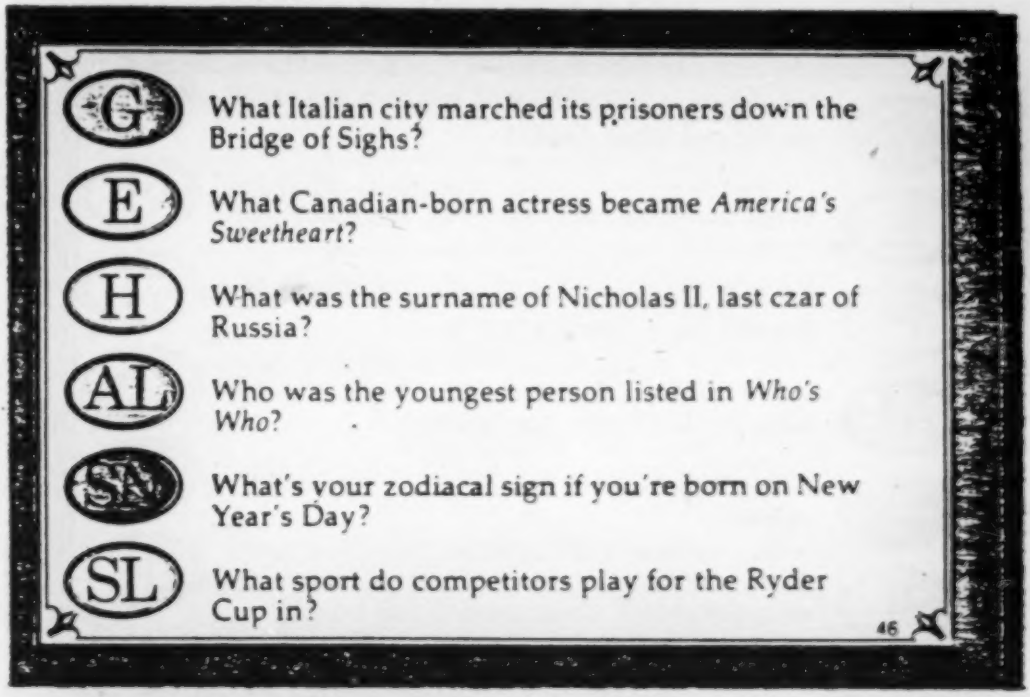
Telstar I

First U.S. communications satellite (A.T.&T. Co.) to amplify radio and TV signals (launched July 10, 1962)

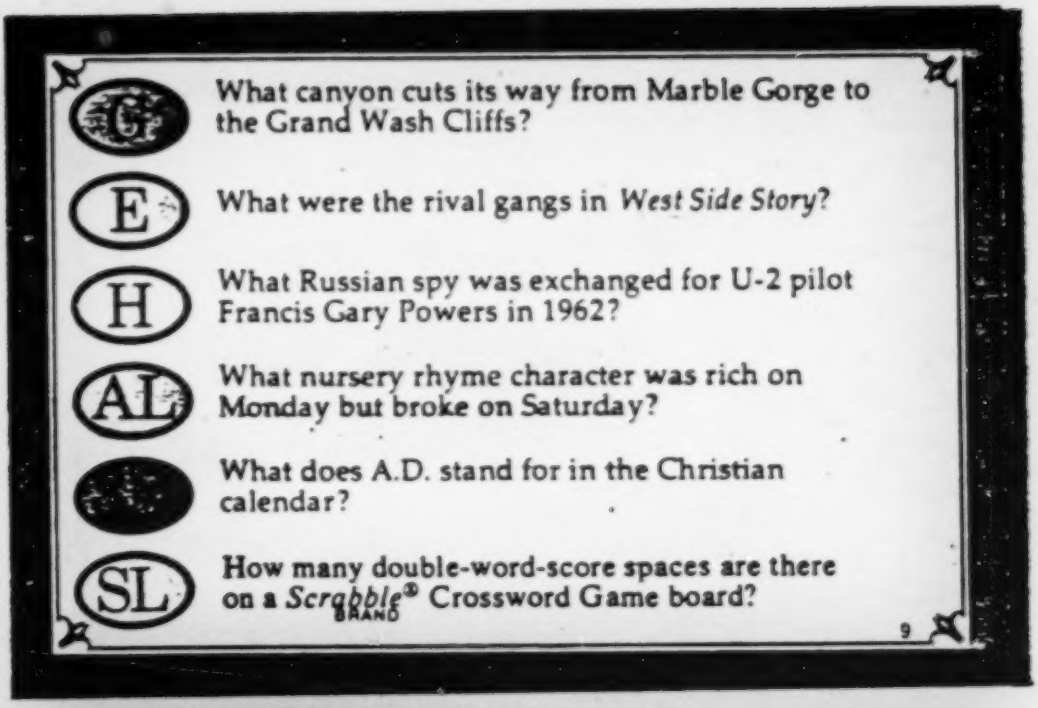
Temple, Shirley

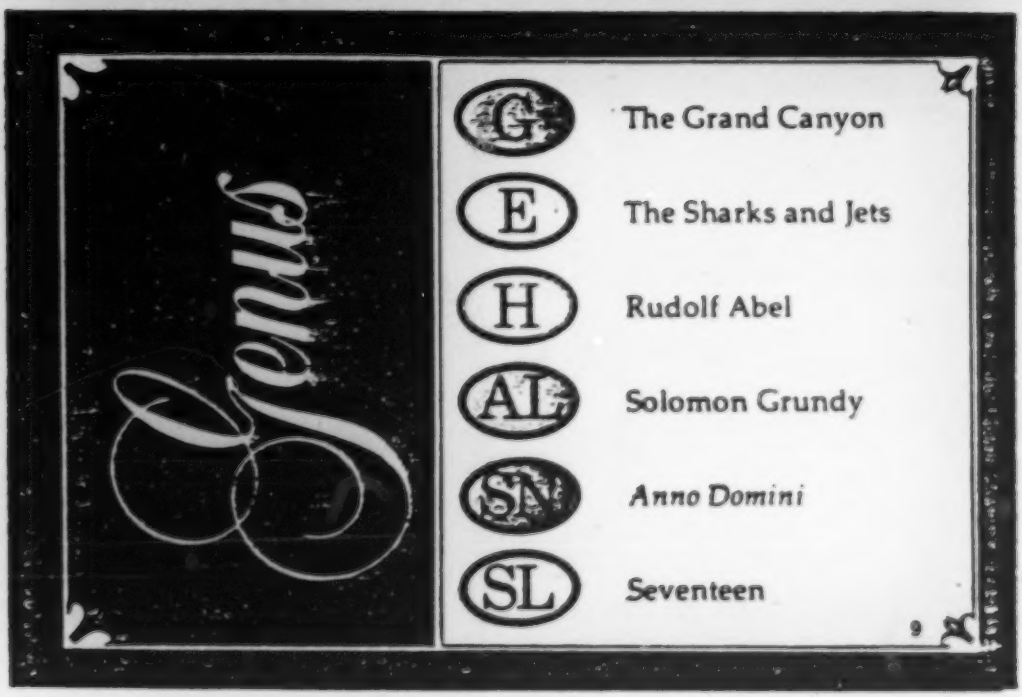
Youngest person to be listed in Who's Who....

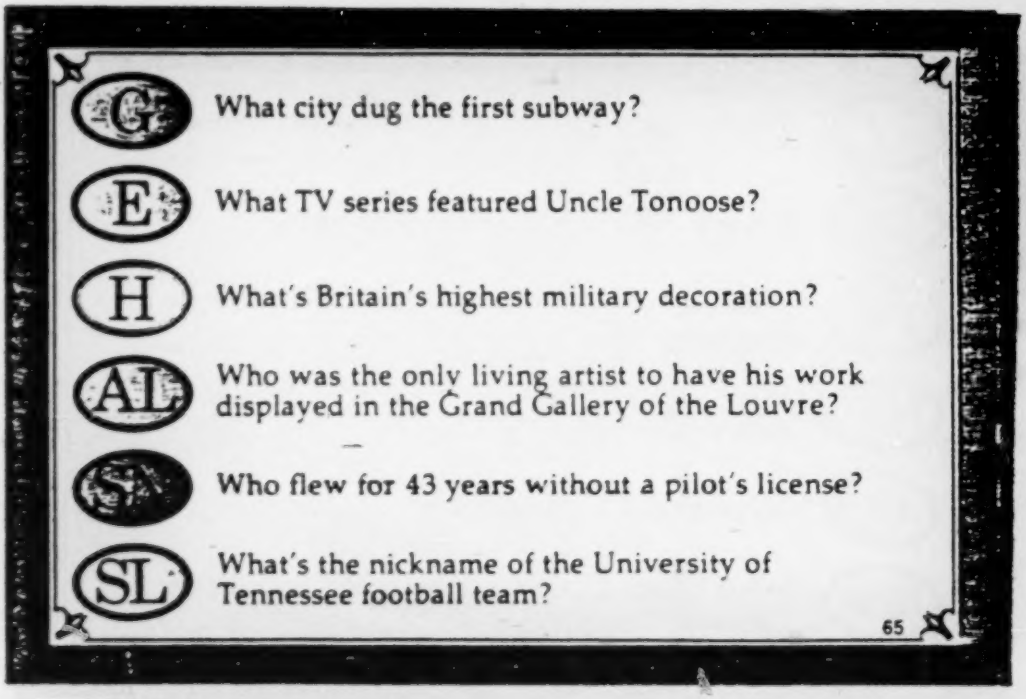
APPENDIX E

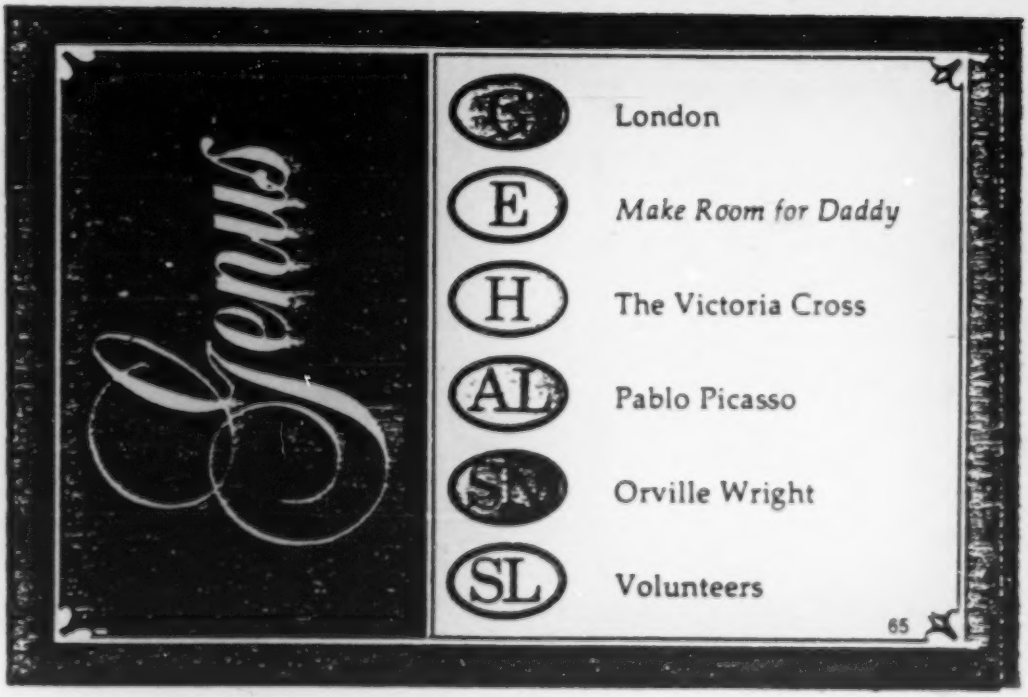

G
What Italian city marched its prisoners down the Bridge of Sighs?
E
What Canadian-born actress became *America's Sweetheart*?
H
What was the surname of Nicholas II, last czar of Russia?
AL
Who was the youngest person listed in *Who's Who*?
SN
What's your zodiacal sign if you're born on New Year's Day?
SL
What sport do competitors play for the Ryder Cup in?
46

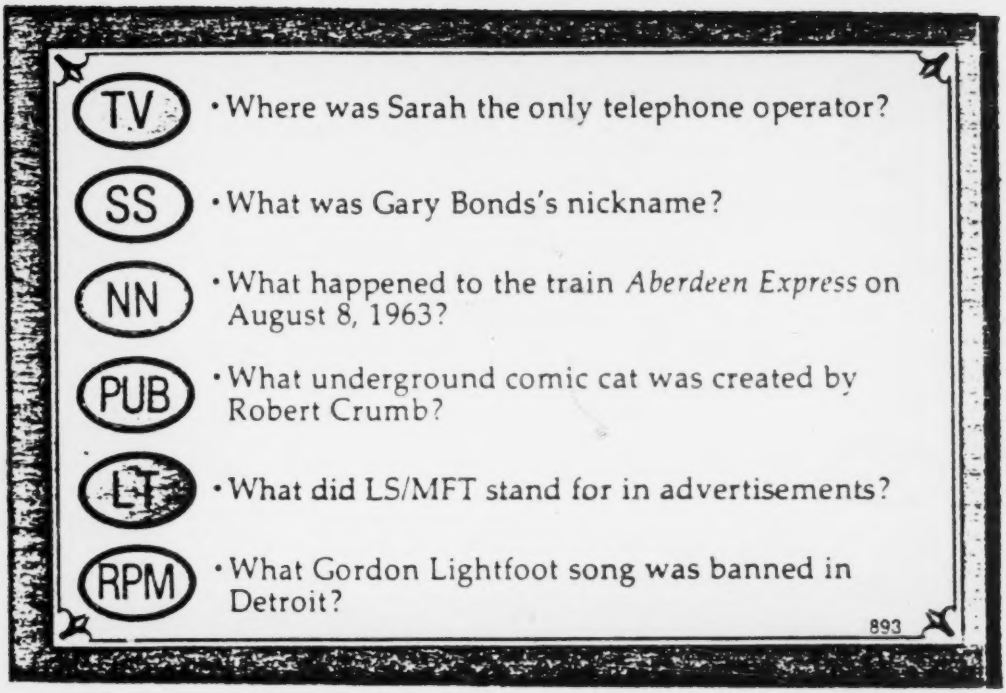
Genius
G
Venice
E
Mary Pickford
H
Romanov
AL
Shirley Temple
SN
Capricorn
SL
Golf
46


G
What canyon cuts its way from Marble Gorge to the Grand Wash Cliffs?
E
What were the rival gangs in *West Side Story*?
H
What Russian spy was exchanged for U-2 pilot Francis Gary Powers in 1962?
AL
What nursery rhyme character was rich on Monday but broke on Saturday?
What does A.D. stand for in the Christian calendar?
SL
How many double-word-score spaces are there on a *Scrabble*® BRAND Crossword Game board?
9


Genius
G
The Grand Canyon
E
The Sharks and Jets
H
Rudolf Abel
AL
Solomon Grundy
SN
Anno Domini
SL
Seventeen
9


G
What city dug the first subway?
E
What TV series featured Uncle Tonoose?
H
What's Britain's highest military decoration?
AL
Who was the only living artist to have his work displayed in the Grand Gallery of the Louvre?
SI
Who flew for 43 years without a pilot's license?
SL
What's the nickname of the University of Tennessee football team?
65


Genius
G
London
E
Make Room for Daddy
H
The Victoria Cross
AL
Pablo Picasso
SI
Orville Wright
SL
Volunteers
65


TV
• Where was Sarah the only telephone operator?
SS
• What was Gary Bonds's nickname?
NN
• What happened to the train *Aberdeen Express* on August 8, 1963?
PUB
• What underground comic cat was created by Robert Crumb?
LT
• What did LS/MFT stand for in advertisements?
RPM
• What Gordon Lightfoot song was banned in Detroit?
893

Baby Boomer
TV
Mayberry
SS
U.S.
NN
It was robbed
PUB
Fritz the Cat
LT
Lucky Strike Means Fine Tobacco
RPM
Black Day in July
893